

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 245 OF 2018

(From the Judgment and decree of the Resident Magistrates' Court of Dar es salaam at Kisutu in Civil Case No. 33 of 2015 dated 15th August, 2018 before Hon. T. K. Simba, **PRM**)

ALEXANDER MUNDEBA APPELLANT

VERSUS

TANZANIA BRUSH PRODUCTS LIMITED RESPONDENT

RULING

18th Sept & 18th Sept, 2020.

E. E. KAKOLAKI J

This is an appeal against the judgment and decree of the Resident Magistrates Court of Dar es salaam at Kisutu in Civil Case No. 33 of 2015 which was entered in favour of the respondent delivered on the 15th day of August, 2018. Discontented the appellant registered his dissatisfaction by way of appeal in this Court canvassed with eight grounds of appeal. Before the appeal could be heard on merit the Respondent raised a preliminary point of objection with one ground to the effect that:

1. The appeal is incompetent for non-compliance with legal requirements, hence should be strike out with costs.

Briefly before the Resident Magistrate's Court of Dar es salaam at Kisutu in Civil Case No. 33 of 2015, the respondent successful sued and secured a decree against the appellant for payment USD 5,400 to the respondent as service charges contribution for a period of 27 months from October, 2012. The appellant is owning an apartment unit No. 5B in a multi apartments building owned by different persons located at Plot No. 477 in which the respondent is a tenant also. For the purposes of better management, administration and maintenance services of the building and other shared annexures such as swimming pool, generator, elevator, car park, servant lavatories as well as security services all occupiers including the appellant agreed to contribute monthly a certain amount of money as service charges. It was agreed and the appellant was contracted to collect the said contributions with one key term and condition of collecting and spending the contributions in accordance with the aimed purposes and later on account for the services expenditure account to the plaintiff every month. Having collected money from tenants the appellant failed to account for the expenditure as a result a suit was instituted against him. After a full hearing of the case the trial court was satisfied that the appellant breached the terms and conditions of the agreement and on the 15/08/2018 entered judgment in favour of the respondent condemning the appellant to pay the respondent a total sum of USD 5,400 and costs of the suit. The decree was extracted on the same dated of the judgment and issued to the appellant on the 02/11/2018 bearing the reliefs granted to the respondent. In addition the

decree ordered payment of Tanzanian shillings Ten million (Tshs.10,000,000/=) to the respondent as general damages. It is from the judgment and decree of the trial court the appellant preferred this appeal.

As a matter of practice when the preliminary objection is raised must be disposed of first before going into the merits of the suit, appeal or application, this court also preferred to so do. Parties agreed to dispose it of by written submission and complied with the filing schedule orders. The appellant is represented by Mr. Alex Mashamba Balomi, learned advocate whereas the respondent has the good services of Mr. Alipo Antunkulepo, learned advocate.

Submitting on the sole preliminary point of objection Mr. Antunkulepo described the non-complied legal requirement of the law to be in two points. **One** that, there is variance between judgment and decree. **Secondly**, the appellant filed a petition of appeal instead of memorandum of appeal. For the reasons to be disclosed soon I chose to start with the first point.

It was Mr. Antunkulepo's contention that there is variance between judgment and decree appealed against by the appellant which renders the appeal incompetent. He said under Order XXXIX Rule 1 of the Civil Procedure Code,[Cap. 33 R.E 2002] every appeal shall be accompanied by a copy of the decree appealed against. However, the said decree is inconsistent with the judgment as the amount of general damages of Tanzania shillings ten million (Tshs. 10,000,000/=) contained in the decree does not feature anywhere in the judgment granted to the respondent which makes it defective. As the decree accompanying the petition or rather memorandum

of appeal is defective then the appeal is incompetent before this court and deserves to be struck out.

On his part Mr. Balomi for the appellant challenges the preliminary objection submitting that the same does not qualify the test of being preliminary objection as held in the celebrated case of **Mukisa biscuits Manufacturing Company Limited Vs. West End Distributors Limited** (1969)E.A 696. No more explanations were advanced by the learned counsel on this point apart from praying this court not to be bound by technicalities when deciding this preliminary objection but rather embrace the need to administer justice. To support his prayer he cited to the court the case of **Judge In-charge High Court at Arusha and the AG Vs. Munuo Ng'uni** (2004) TLR 50 and **Nimrod Mkono Vs. State Travel Services** (1992) TLR. In addition to that, he invited this court to invoke the overriding principle (oxygen principle) as provided under provisions of section 3A of the CPC as amended by Written Laws (Miscellaneous Amendment) Act, No.3 of 2018 to disregard the non-meritorious preliminary objection raised by the respondent by overruling the objection and proceed to hear the appeal.

Having considered the rival submissions by both parties, petition of appeal and the attached impugned judgment and decree it is evident to me that the said decree is inconsistent with the judgment for containing general damages to the tune of Tanzania shillings ten million (Tshs. 10,000,000/=) not featuring anywhere in the judgment. As to whether the preliminary objection raised does not meet the test set described in the case of **Mukisa Biscuits** (supra) I think this contention should not detain this court as the appellant has failed to support his assertion for just so stating so without

more. Now coming to the issue as to whether the decree is defective or not as alluded herein above there is no dispute that the same is at variance with the judgment. It is therefore defective in its content. The law under Order XXXIX Rule 1(1) of the CPC makes it mandatory that the memorandum of appeal must be accompanied with a copy of decree appealed from. Rule 1(1) of Order XXXIX provides:

*1.-(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the **memorandum shall be accompanied by a copy of the decree appealed from** and (unless the Court dispenses therewith) of the judgment on which it is founded. (emphasis supplied).*

In this appeal the decree accompanying the petition or rather the memorandum of appeal is defective. When a decree is defective the effect is to render the record of appeal defect which in turn affect the appeal for rendering it incompetent. This stand is well stated by the Court of Appeal in the case of **Mohamed Suleiman Mohamed Vs. Amne Salum Mohamed and 10 Others**, Civil Appeal No. 142 of 2017 (CAT unreported) when considering Rule 96(1) of the Court of Appeal Rules, 2009, which makes it mandatory that a record of appeal must contain, among other documents, a copy of a decree had this to say:

*“Under Rule 96(1)(h) of the Rules, it is mandatory that a record of appeal must contain, among other documents, a copy of a decree. Therefore, when a decree is defective, the effect is that the record becomes defective. See the case of **Victor Frank Ishebabi Vs. Leisure Tours and Holding and Others**, Civil Appeal No. 152 of 2004, **Dhow Merchantile (E.A) Ltd Vs. Abdirizzak S. Tuke**, Civil Appeal No. 93 of 2004 (both unreported). **For an appeal to be competent it has to be accompanied by a valid decree in terms of Rule 96(1)(h) of the Rules.**”*(emphasis supplied)

The Mr. Balomi has invited this Court to invoke the oxygen principle as well stated under section 3A of the CPC as amended. The section provides:

3A.-(1) The overriding objective of this Act shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by this Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

What is gleaned from the above provision is that this Court when interpreting any provision of the law should seek to embrace the overriding objective of the CPC which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. However, it is settled that the advent of this provision was not designed to blindly disregard the rules of procedure that are coached in mandatory terms. This position of the law was spelt in

the case of **Njake Enterprises Ltd Vs. Blue Ltd and Rock Venture Company Ltd**, Civil Appeal No. 69 of 2017 (CAT-unreported) where the Court had this to say:

“Also, the overriding principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons introducing the principle in the Act. According to the Bill it was said thus:

“The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms.” (emphasis supplied).

As alluded above the decree is defective. Order XXXIX Rule 1 of the CPC makes it mandatory that memorandum of appeal must be accompanied by a copy of decree. A decree must be valid one to have a competent appeal. In this matter the appeal was filed by the advocate who is learned in law, thus it was expected of him to note the defect and have it amended by the trial court before the petition or memorandum of appeal is filed in Court. It is from those reasons this court refutes the appellant’s invitation and makes a finding that this is not a fit case to apply the oxygen principle. It follows therefore that the first limb of preliminary object has merit and the same is sustained. Having so found I see no pressing issue that calls me to consider and determine the second limb of preliminary objection as doing so will remain academic exercise which I am not prepared to venture into at the moment.

In the circumstances and for the foregoing reasons, the appeal is incompetent and is consequently struck out. The appellant is at liberty to refile a fresh appeal but subject to limitation of time.

Costs to be taxed to the appellant.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of September, 2020.


E. E. KAKOLAKI

JUDGE

18/09/2020



Delivered at Dar es Salaam this 18th day of September, 2020 by the Deputy Registrar of the High Court, in the presence of Mr. Alipo Antunkulepo advocate for the defendant and holding brief for Mr. Alex Mashamba Balomi advocate for the plaintiff and Ms. Lulu Masasi, court clerk.

Right of Appeal explained.


E. E. Kakolaki

JUDGE

18/09/2020

